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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

AMY DENISE GRANADOS,

Defendant and Appellant.

F071321

(Super. Ct. No. F14903336)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Hill, P.J., Detjen, J. and Peña, J.

Appellant Amy Denise Granados appeals from the partial denial of her petition for resentencing, filed pursuant to Proposition 47. Appellant contends she was eligible for resentencing on three convictions for second degree burglary (Pen. Code, §§ 459, 460, subd. (b))¹ and that a remand is required to determine whether appellant was eligible for resentencing on a fourth conviction for second degree burglary. Appellant further contends the trial court was responsible for determining her eligibility and, should this court disagree, she received ineffective assistance of counsel when her counsel did not specifically argue the four contested convictions were eligible for resentencing. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

By way of a first amended complaint filed on April 25, 2014, appellant and a co-conspirator were charged with a total of 40 criminal counts relating generally to an identity theft operation of which appellant was a participant. Included in these 40 counts were a charge for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 4), several charges for second degree burglary (§§ 459, 460, subd. (b); counts 7, 16, 28, & 32), and several charges for various versions of identity theft (§ 530.5, subds. (a), (c)(3); counts 1, 10, 19, 21, & 25). Appellant pled nolo contendere to 11 of the charged counts, including the 10 just noted. As part of the plea agreement, the People agreed to an eight-year lid on appellant's sentence, and appellant was, in fact, sentenced to eight years in the Fresno County jail. The plea required the remaining counts be dismissed.

With respect to the burglary charges, the probation report shows that appellant participated in four distinct events. Count 7 arose from an incident where appellant entered a Target store and attempted to purchase \$338.73 worth of goods with an allegedly fraudulent check. The transaction was denied because appellant was known by

¹ All statutory references are to the Penal Code unless otherwise noted.

Target to have passed fraudulent checks in the past. Count 16 involved appellant opening a \$2,000 line of credit at a La-Z-Boy store in the name of one of her victims and, later, purchasing a floor model for an unknown value. Appellant denied delivery of the goods and never received the floor model due, in part, to the account being flagged as fraudulent. Count 28 was filed because appellant opened a credit account at Target in another victim's name. Appellant used this account to obtain \$937.67 worth of goods. Finally, count 32 was submitted as part of a series of charges alleging appellant was involved in using identities stolen from files belonging to the Windscape Apartments to engage in a series of fraudulent purchases at Target which appeared to typically involve goods valued at less than \$400 but totaled \$6,684.82 across all transactions.

On November 14, 2014, appellant filed a one-page petition requesting resentencing under Proposition 47 for the convictions leading to her eight-year sentence. A hearing on appellant's petition was held on February 23, 2015, at which time appellant was resentenced on count 4, the Health and Safety Code violation. This change reduced appellant's total sentence to seven years, four months. No other charges were discussed at the hearing and neither the People nor appellant's counsel objected to any part of the resentencing on count 4.

This appeal timely followed.

DISCUSSION

Appellant argues the trial court erred in failing to recognize that appellant's second degree burglary convictions were either eligible for resentencing or required an evidentiary hearing to determine eligibility. In making this argument, appellant alleges that her intent in entering various stores to fraudulently purchase goods was, ultimately, to commit a larceny.

Standard of Review and Applicable Law

"In November 2014, California voters enacted Proposition 47, which 'created a new resentencing provision: section 1170.18. Under section 1170.18, a person

“currently serving” a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be “resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” ’ ’ ’ (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448 (*Rivas-Colon*).)

“Proposition 47 added section 459.5, which classifies shoplifting as a misdemeanor ‘where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).’ (§ 459.5, subd. (a).) ‘[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered “a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours,” and whether “the value of the property that [was] taken or intended to be taken” exceeded \$950. (§ 459.5.)’ ’ ’ (*Rivas-Colon, supra*, 241 Cal.App.4th at p. 448.)

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 (*Sherow*).)

As the trial court’s eligibility determination is factual in nature, we review that determination for substantial evidence. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960; see *Rivas-Colon, supra*, 241 Cal.App.4th at p. 452, fn. 4 [“ ‘[T]he basic structure of Proposition 47 is strikingly similar to Proposition 36’ and ‘much of the appellate interpretation of Proposition 36 is likely relevant in the interpretation of Proposition 47.’ ”]; *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331.)

Appellant's Petition Failed to Demonstrate Initial Eligibility on the Burglary Counts

As noted, appellant's initial petition was a single page which merely identified the case for which she sought resentencing. Thus, similar to *Sherow*, the "petition here gave virtually no information" regarding appellant's eligibility for resentencing. (*Sherow*, *supra*, 239 Cal.App.4th at p. 880.) Despite this lack of information, the trial court was able to identify one charge that was eligible for resentencing on its face. Appellant provided no evidence, however, suggesting her burglary convictions were eligible for resentencing, such as through evidence of an intent to commit larceny sufficient to satisfy the new shoplifting statute.² As the burden was properly upon appellant to provide evidence of initial eligibility, the trial court's failure to independently identify whether additional charges were eligible for resentencing was not erroneous.³

Regardless, we recently analyzed the meaning of the shoplifting statute and found that larceny, as used in that statute, should be interpreted according to its common law definition. (*People v. Martin* (Dec. 12, 2016, F071654) ___ Cal.App.5th ___, ___ [2016 Cal.App. LEXIS 1077, *25].) As such, to demonstrate eligibility, appellant must demonstrate an intent to commit a trespassory taking, among other elements. (*Ibid.*) The facts contained in the record before us do not meet this requirement. In each of the four convictions at issue, appellant attempted to obtain goods through what was believed by the victim to be a valid sale, thus failing to satisfy the common-law definition of a

² Appellant's failure could very well be the result of confusion, as her petition was filed within 10 days of the statute coming into effect and thus was made without the substantial guidance that has followed from the courts. Appellant's petition is therefore properly denied without prejudice, should appellant be able to overcome the shortcoming noted herein via a subsequent petition. (See *People v. Perkins* (2016) 244 Cal.App.4th 129, 139-140.)

³ Notably, the trial court never formally denied appellant's motion with respect to the majority of appellant's convictions, either by minute order or orally. It merely granted appellant's petition with respect to count 4, thereby implicitly denying the remaining counts.

trespassory taking. (*Id.* at pp. ____ - ____ [*id.* at pp. *25-*26].) Because no set of facts in the record before us demonstrates appellant was eligible for resentencing, we need not further consider appellant's argument that counsel was ineffective for failing to raise the issue to the trial court. (*People v. O'Malley* (2016) 62 Cal.4th 944, 1010 fn. 12.)

DISPOSITION

The order is affirmed without prejudice.